



**Resource Management Law Association
of New Zealand Inc.**

**Discussion Document on
Setting a direct referral threshold and related matters**

TO: Ministry for the Environment

**Submission on behalf of the
Resource Management Law Association of New Zealand Inc**

Introduction

1. This Submission on the discussion document 'Setting a direct referral threshold and related matters' (**Discussion Document**) is made by the Resource Management Law Association of New Zealand Inc (**RMLA**).
2. The RMLA is concerned to promote within New Zealand:
 - a. An understanding of Resource Management Law and its interpretation in a multi-disciplinary framework;
 - b. Excellence in resource management policy and practice; and

- c. Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.
3. The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives and others. Currently the Association has some 1,100 plus members. Within such an organisation there is inevitably a divergent range of interests and views of members.
4. While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the matters raised in the Discussion Document. It should also be noted that a number of members may be providing their own individual submissions and those submissions may represent quite different approaches to the views expressed here.
5. For these reasons, this submission does not seek to advance any particular policy position in relation to the Discussion Document, but rather is kept at a reasonably high level and is made with a view to ensure that the proposed regulations:
 - a. are consistent with the general framework of existing laws and policies of relevance, including the Resource Management Act 1991 (**RMA**);
 - b. are practicable and workable; and
 - c. will assist in promoting best practice.

Discussion Document

6. Consultation is being undertaken by the Ministry for the Environment for the purpose of gaining feedback about the issue of investment thresholds in the direct referral process.

In order to improve the certainty of the direct referral consent pathway, as provided for in the Resource Management (Simplifying and Streamlining) Act 2009, the Resource Management Amendment Act 2013 (**RMAA 2013**) makes it mandatory for a consent authority to grant a direct referral request in cases where a certain investment threshold is met. Consent authorities however retain the ability to refuse a request if they deem that the threshold is not met or 'exceptional circumstances' exist. In addition, even if the value threshold is not met, a consent authority still retains discretion to grant a direct referral request.

7. RMAA 2013 enables the government to make regulations which prescribe investment threshold amounts, and s62 (s360 (1)(hm) of RMA) allows for regulations which prescribe threshold amounts that vary for proposals of different types or in different locations.
8. The Discussion Document sets out possible approaches to measuring the investment value, the number of investment thresholds there should be, the 'height' of the threshold, and the exceptional circumstance 'matters'; and asks for submitter feedback on the issues raised.

SUBMISSION

Possible approaches to measuring investment value

9. Specific matter – The Discussion Document puts forward three options to specify the threshold investment value of a proposal in monetary terms: capital investment value of a project; wider impacts of a project on economic activity; or net present value assessment of all costs and benefits of a project.
10. Submission - RMLA considers that the approach to measuring investment value chosen must be within the scope of the Act, and should be relatively straightforward for applicants to understand and councils to administer.

11. Section 87E(6A) of the RMA now provides that where the *value of an investment* exceeds the threshold expressed in regulations, the consent authority must grant a request for direct referral unless exceptional circumstances exist. It is important to note that although a proposal may fall under the value of investment prescribed in regulations pursuant to s87E(6A), the consent authority still has a discretion to grant the direct referral request.
12. The statutory test expressed in the Act is the "value of the investment". That suggests a singular focus on how much is to be invested, rather than a wider evaluation of costs and benefits. If that is correct, then the third option proposed in the discussion document of a net "value" derived from both costs and benefits of the project may not be within the scope of the legislation. That option is also likely to be difficult to administer as undertaking a cost-benefit evaluation usually requires numerous assumptions to be made, which can be difficult to test even at a substantive hearing, let alone in the context of a preliminary or threshold decision to direct refer or not.
13. Similar issues arise in the context of an economic impact threshold, and it would somewhat defeat the apparent purpose of threshold regulations if too much scope for evaluation is left to consent authorities, who may in turn retain independent experts to review the assessments put up by applicants in attempting to show the threshold is achieved. The costs of demonstrating the threshold is met may become a significant deterrent to the direct referral route if this option is applied.
14. As noted above, a consent authority still has discretion to approve a direct referral request for any project that has a lower investment value than set in the proposed regulations but is regionally significant in terms of its potential contribution to regional or national gross domestic product, employment growth, social, cultural or environmental benefits. It is considered that this discretion is clear in s87E of the RMA, and bearing in mind that if any application is declined, there is a further opportunity for an applicant to object to the consent authority's decision (pursuant to s87E(9)).

15. It is considered that it would be better for the regulations to set a clear, straight forward value figure. A capital investment value approach would be the least complicated, and the most straightforward to define, measure and verify, as outlined in the Discussion Document. It is therefore considered that a clear threshold based on capital value of the project is an appropriate threshold to set in the regulations.
16. Recommendation – That the threshold be based on the capital investment value of a project.

Single versus different threshold amounts

17. Specific matter – The Discussion Document raises whether a single threshold amount should apply nationwide, irrespective of the type or location of a proposal.
18. Submission – It is considered that a single threshold is appropriate to apply on a national basis. In particular, if a capital investment value (excluding land costs) is used as the threshold, the capital costs of a project should not differ very significantly between regions. A single threshold would be easier to set and review as required.
19. Recommendation – For simplicity and certainty, it is recommended that a single threshold should apply on a national basis.

Height of the threshold amount

20. Specific matter - The Discussion Document asks what the 'height' (or level) of the threshold amount should be, helpfully setting out a table detailing the number of projects of certain investment values that have been consented per year. Considering its aim to comment on workability rather than policy, the RMLA does not have an opinion on the height of the threshold amount.

21. Comment - The RMLA considers that the suggested consequence of setting the threshold "too low", i.e. leading to a flood of direct referral applications clogging up the Environment Court, is unlikely to materialise to any significant extent. Many applicants prefer the usual "two-step" process. It allows them to engage to a greater extent with the local community. It also gives an applicant two chances to run its case, if necessary with modifications to the proposal from one stage to the other. There are also significant costs associated with a direct referral, given the presumption that an applicant will pay costs to the Crown for the Environment Court's costs, as well as to the Council for its role in assisting the Court. Costs can also be awarded to s274 parties as well.

The exceptional circumstance 'matters'

22. Specific matter – The Discussion Document has raised a number of matters that could be prescribed in regulations to allow a consent authority to refuse a direct referral request even though the proposal satisfies the value threshold.
23. Submission – It is noted that the legislative intent of the direct referral provisions is to fast track (with time and cost savings) 'regionally significant' resource consent and notice of requirement applications to the Environment Court, where it is likely that the project if determined at first instance by the consent authority would be subject to appeal to the Environment Court in any event. Therefore, it is anticipated that any particular proposal will be of public interest and have a degree of opposition. The matters of 'exceptional circumstances' (if listed) should therefore address matters that make it appropriate for an application to still be considered by the consent authority (rather than the Court at first instance), notwithstanding the intent of the 'fast track' provisions, and in such a context.
24. The RMLA has considered the three options open to address 'exceptional circumstances', and the potential benefits and disadvantages of each:
 - a. Not listing the 'exceptional circumstance' matters – This would leave it to a consent authority to determine in any particular case whether or not there is an exceptional

circumstance. The Discussion Document noted that this would risk reintroducing uncertainty in the direct referral pathway. However, consent authorities are already tasked with making similar assessments and decisions for ‘exceptional circumstances’ or ‘special circumstances’, including under sections 107(2)(a) and 369(4)(a) in respect of the grant of a discharge or coastal permit and under s95A(3) in respect of notification. The Discussion Document records that between October 2009 and April 2014, 21 applications have been directly referred, although it does not confirm how many direct referral applications were refused during this period. The RMLA consider that this number is low, suggesting that there is not a concern that consent authorities are refusing appropriate applications. Furthermore, if an applicant disagrees with a consent authority’s decision, under s87E(9) of the RMA the applicant has a right to object.

- b. A short list of ‘exceptional circumstance’ matters with a more general catch all matter (provided that the general catch all matter emphasized the need for the circumstances to be exceptional) – This option would give some guidance to consent authorities as to matters that constitute an ‘exceptional circumstance’ while also acknowledging the difficulty in defining all matters that may arise, and that would potentially make it appropriate for the consent authority to retain discretion in respect of the direct referral decision.
 - c. A complete list of ‘exceptional circumstance’ matters – The RMLA is concerned that this approach would lead to a long list of matters to be specified that may stray outside the ambit of an ‘exceptional circumstance’, while also being too prescriptive and risk not covering a particular situation where direct referral should be refused.
25. We comment on the suggested matters of ‘exceptional circumstance’ raised in the Discussion Document below.
26. The Discussion Document records that Treaty Settlement legislation and agreements may require the consent authority to consult with local iwi when deciding a direct referral application. It is agreed that it is appropriate for a consent authority to have the ability to

decline a direct referral request where it is inconsistent with or conflicts with the consent authority's obligations under other legislation, including Treaty Settlement legislation.

27. The Discussion Document queries whether the quality of the valuation of a proposal should be an exceptional circumstance. It is considered appropriate that a consent authority should have the discretion to refuse a direct referral request if the valuation that sets it above the threshold is unsound. If the threshold is based on capital investment value, the valuation and the consent authorities review of the valuation would be a relatively straight forward task. However, this does not need to be an "exceptional circumstance" that should be included in any stated list. Rather it is part of the Council's duty to determine whether it is "likely" that the threshold value is met. If the methodology or information supplied is unsound, the Council can at that stage resolve that it is not "likely" that the threshold value is met. If another threshold value is used, it is also appropriate for the consent authority to review the rigor of the assessment at that stage, although this will be more complex (and is another reason to prefer the capital value threshold).
28. The Discussion Document raises that there may be local accountability reasons that makes it appropriate for the consent authority to retain discretion to grant or refuse the direct referral request. An example given in the Discussion Document is where a proposal will require significant further public infrastructure investment. Any particular project may require or be dependent on investment in public infrastructure, and in many cases this investment (or part of it) will be at the cost of the applicant by way of financial or development contributions. However, a proposal cannot 'force' a consent authority to invest in public infrastructure. If this matter is to be included as a matter of exceptional circumstance, it should be clearly limited to situations where a proposal would have a significant adverse impact on the public infrastructure investments (either existing or planned) of the consent authority.
29. The Discussion Document also raises that if there is an exceptional high level of public concern about a proposal it may be appropriate for the consent authority to decide the request for direct referral. It is noted in the Discussion Document that the consent

authority could then discuss with the applicant some possible advantages to a first instance council hearing and decision. RMLA considers that the consent authority could raise and discuss these matters with the applicant when a request is made under s87D of the RMA, and that the level of public interest is a matter for the applicant to consider in deciding to proceed with direct referral, rather than it being a reason to enable the consent authority to have discretion to refuse the request. It is noted that for proposals of national significance, widespread public concern or interest is one relevant factor that the Minister may have regard to in deciding to call the matter in to be heard by a Board of Inquiry or the Environment Court. To be consistent, it is considered that public concern should not be a reason to decline a direct referral request for a regionally significant project. It is also noted that the applicant (following any discussion with the consent authority) may decide not to proceed with the direct referral request pursuant to s87G(1) before it is referred to the Environment Court. RMLA considers that this matter does not qualify as an 'exceptional circumstance'.

30. Recommendation – It is considered that the regulations should either not define the matters of 'exceptional circumstances' and leave this to the assessment of the consent authority, or alternatively provide a short list of matters to give some guidance together with a more general matter that will cover exceptional circumstances that may not currently be foreseen (provided that the general matter still makes it clear that exceptional circumstances are expected to be rare).

Concluding comments

31. The RMLA appreciates the opportunity to comment on the Discussion Document, and we hope that the feedback above is of some assistance to the Ministry for the Environment in the preparation of the regulations.



Signature of Martin Williams, President
on behalf of the Resource Management Law Association

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